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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. ROSARIO CRUZ-SAUCEDO, Appellant.	2 CA-CR 2008-0393 DEPARTMENT B MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20074399

Honorable Deborah Bernini, Judge

AFFIRMED IN PART, VACATED, AND REMANDED

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V Á S Q U E Z, Judge.

¶1 After a jury trial, appellant Rosario Cruz-Saucedo was convicted of two counts each of possessing heroin for sale and sale of heroin, and single counts of possessing cocaine, sale of cocaine, possessing a firearm during a felony drug offense, and illegally conducting a criminal enterprise. The trial court sentenced him to presumptive, concurrent terms of imprisonment, the longest of which was five years.

¶2 On appeal, Cruz-Saucedo argues the trial court erred by denying his motion to suppress, urged on the ground the search warrant that precipitated his arrest was not supported by probable cause, and by overruling his objection to the state's use of a peremptory strike against a Hispanic juror. He also contends that discrepancies in the record with respect to his sentences on several of the counts require that he be resentenced. For the reasons stated below, we affirm his convictions on all counts, affirm his sentences on all but two counts, and remand to the trial court for resentencing on those two counts.

Factual and Procedural Background

¶3 In the course of an undercover investigation of a heroin distribution ring, police officers with the Counter Narcotics Alliance purchased drugs from Miguel Haro-Arce, the suspected leader of the organization, and others involved in the ring. Officers also conducted surveillance on a trailer and two vehicles connected with Haro-Arce that had been used in the sale of drugs. Cruz-Saucedo participated in two of the drug sales to undercover officers. On October 10, 2007, officers stopped Haro-Arce, and a narcotics dog alerted to the presence of drugs in his vehicle. Officers obtained a warrant to search the trailer, where they found handguns, narcotics, and ledgers showing drug transactions.

Cruz-Saucedo, who was residing in the trailer at the time, was arrested and found to have several packages of heroin and cocaine in his pocket.

¶4 He was charged with a total of eight counts: count one, illegally conducting an enterprise; count eight, sale of cocaine; counts nine and ten, sale of heroin; count twenty, possession of heroin for sale; count twenty-one, possession of cocaine for sale; count twenty-two, possession of heroin for sale; and count twenty-three, possession of a deadly weapon during a felony drug offense.[1] After a joint trial with Haro-Arce and two other codefendants, a jury found Cruz-Saucedo guilty as charged except as to count twenty-one, on which it convicted him of the lesser-included offense of possession of cocaine. The jury also found as to each of the heroin-related counts that the quantity of heroin involved exceeded the threshold amount of one gram pursuant to A.R.S. § 13-3401(36)(a). Cruz-Saucedo was sentenced as noted above, and this appeal followed.

Discussion

Motion to suppress

¶5 Cruz-Saucedo argues the trial court erred in denying his motion to suppress all of the drug and weapons evidence on the ground the warrant to search the trailer was not supported by probable cause. "We review for abuse of discretion the trial court's factual findings on a motion to suppress but review *de novo* the trial court's ultimate legal determination that the search complied with the requirements of the Fourth Amendment to the United States Constitution." *State v. Davolt*, 207 Ariz. 191, ¶ 21, 84 P.3d 456, 467

[1]For ease of reference, we refer to these counts as renumbered by the trial court; in the original indictment, they were numbered one, ten, eleven, twelve, forty-one, forty-two, forty-three, and forty-four, respectively.

(2004) (citation omitted). In reviewing the court's determination that probable cause existed, we are mindful that its "task is to determine whether the totality of the circumstances indicates a substantial basis for the magistrate's decision," *State v. Hyde*, 186 Ariz. 252, 272, 921 P.2d 655, 675 (1996); that it must grant deference to that decision, *id*.; and that it "must presume a search warrant is valid; it is the defendant's burden to prove otherwise," *State v. Crowley*, 202 Ariz. 80, ¶ 7, 41 P.3d 618, 621 (App. 2002).

¶6 "A warrant is supported by probable cause if the supporting affidavit contains facts from which a reasonably prudent person could conclude that the items sought are related to criminal activity and are likely to be found at the place described." *State v. Prince*, 160 Ariz. 268, 272, 772 P.2d 1121, 1125 (1989). Cruz-Saucedo contends the oral affidavit made by Tucson police officer John Dimas "provided insufficient and limited information based on inadequate surveillance and confusion as to which trailer was to be searched" and "was not specific as to [the] times" of the underlying drug activity. Thus, he argues, Dimas failed to establish probable cause to search the trailer for narcotics and drug paraphernalia. However, aside from quoting provisions from the United States and Arizona Constitutions and citing two blocks of pages from the hearing transcript, he makes no attempt to apply the law to the facts of this case or otherwise to support his argument. He therefore arguably has waived it. *See State v. Bolton*, 182 Ariz. 290, 298, 896 P.2d 830, 838 (1995) (insufficient argument constitutes waiver of claim); Ariz. R. Crim. P. 31.13(c)(1)(vi) (appellant's brief shall include concise argument

containing "contentions . . . and the reasons therefor, with citations to the authorities, statutes and parts of the record relied on").

¶7 In any event, we can find nothing deficient in Dimas's description of the trailer as

> on the premises of 1741 West Wetmore . . . in Tucson, Arizona . . . a multi housing trailer complex. Trailer number 39 is located on the southern portion of this property. The trailer is white in color with tan trim. The front door faces north and the numbers are black in color and are located on the northeast corner of the trailer.

And Dimas further averred the trailer was the "first location" for Haro-Arce's drug operation; Haro-Arce had been seen going there; and, although he no longer lived there, he had "runners [there] that help[ed] him . . . distribute . . . narcotics."

¶8 Nor are we persuaded that the warrant was unsupported by probable cause because Dimas "was not specific as to times." Dimas stated he had purchased heroin from Haro-Arce on nine occasions between July 5 and September 19, 2007, and a Jeep that Haro-Arce had driven on one or more of these occasions was parked at the Wetmore address when Dimas made the affidavit on October 11. Although he did not specify when Haro-Arce last had been to or used the trailer,[2] "where the information evidences activity of a continuous nature the passage of time becomes less significant." *State v. Hale*, 131 Ariz. 444, 446, 641 P.2d 1288, 1290 (1982). And "continuous illegal activity

[2]To the extent Cruz-Saucedo argued at the suppression hearing that it was not clear from the surveillance that Haro-Arce "was actually going into [trailer] 39," he has apparently abandoned this argument on appeal. *See State v. Moody*, 208 Ariz. 424, n.9, 94 P.3d 1119, 1147 n.9 (2004) (failure to argue claim constitutes abandonment). We therefore do not consider it further.

is inherent in a large-scale narcotics operation." *Id*. As the trial court noted, "[a]dditional questions could have been asked, maybe should have been asked" by the magistrate, but the record supports the court's ultimate conclusion that the facts in the affidavit were sufficient to support the magistrate's determination that illegal narcotics and associated evidence would be found in the trailer. *See Prince*, 160 Ariz. at 272, 772 P.2d at 1125.

Jury selection

¶9 Relying on *Batson v. Kentucky*, 476 U.S. 79 (1986), Cruz-Saucedo argues the trial court erred in overruling his objection to the state's use of a peremptory challenge to exclude a Hispanic person from the jury. The state may not exercise peremptory challenges based on a juror's race. *Id*. at 91. To establish for purposes of *Batson* that impermissible discrimination occurred, a defendant first "must make a prima facie showing that a peremptory challenge has been exercised on the basis of race." *Miller-El v. Cockrell*, 537 U.S. 322, 328 (2003). Hispanics are "a cognizable racial group" for purposes of such an objection. *State v. Reyes*, 163 Ariz. 488, 490, 788 P.2d 1239, 1241 (App. 1989). Once a prima facie showing has been made, "the prosecution must offer a race-neutral basis for striking the juror in question . . . [and] the trial court must determine whether the defendant has shown purposeful discrimination." *Miller-El*, 537 U.S. at 328-29 (citation omitted). On review, we defer to the court's factual findings unless clearly erroneous, but we review its legal determinations de novo. *State v. Gay*, 214 Ariz. 214, ¶ 16, 150 P.3d 787, 793 (App. 2007).

¶10 Here, Cruz-Saucedo challenged the state's peremptory strike of the only remaining Hispanic on the panel. The prosecutor stated the juror had been struck because

he "had family members who had been convicted and arrested for crimes involving drugs and . . . who . . . [had] committed suicide . . . [as] a result of drugs and drug use." The court found these reasons to be race neutral and denied the objection.

¶11 Cruz-Saucedo does not argue the state's explanation was insufficiently neutral or was unsupported by the record; he contends only that "the trial court did not fully . . . address the prosecutor's stated reason" for striking the juror. However, he cites no authority to support his apparent contention that the court was required to explain its determination that the state's reasons were race neutral, and we are aware of none. He therefore has waived this issue. *See Bolton*, 182 Ariz. at 298, 896 P.2d at 838. In any event, we find no error in the court's denial of the *Batson* objection.

Sentence

¶12 Cruz-Saucedo argues the case should be remanded for resentencing because of discrepancies among the trial court's sentencing minute entry, the commitment order, and the transcript of the sentencing hearing. "Upon finding a discrepancy between the oral pronouncement of sentence and a minute entry, a reviewing court must try to ascertain the trial court's intent by reference to the record." *State v. Stevens*, 173 Ariz. 494, 496, 844 P.2d 661, 663 (App. 1992).

¶13 Although the minute entry, commitment order, and transcript all show the trial court imposed concurrent, presumptive prison terms, the longest of which was five years, discrepancies exist with respect to the sentences imposed for count twenty-one (possession of cocaine) and count twenty-two (possession of heroin for sale). The transcript and commitment order show a sentence of 2.5 years on count twenty-one,

while the minute entry shows a sentence of five years. And, although the transcript contains no mention of count twenty-two, both the minute entry and commitment order indicate a sentence of five years on that count. The state concedes that, because "it is impossible to discern the trial court's intent from this record," resentencing on these counts is appropriate. *See Stevens*, 173 Ariz. at 496, 844 P.2d at 663. We agree.

¶14 Cruz-Saucedo additionally contends the trial court did not sentence him on count twenty-three.[3] However, the transcript shows that, once the court realized the omission had occurred, it imposed a 2.5-year term of imprisonment for this count. The court subsequently filed a separate commitment order reflecting such a sentence. We therefore remand for resentencing on counts twenty-one and twenty-two only.

Disposition

¶15 For the reasons stated above, we affirm Cruz-Saucedo's convictions and his sentences on all counts but twenty-one and twenty-two. We vacate the sentences imposed on counts twenty-one and twenty-two and, as noted above, remand for resentencing on those counts only.

/s/ Garye L. Vásquez
GARYE L. VÁSQUEZ, Judge

[3]Cruz-Saucedo also notes that although "[c]ount 8 was alleged to have been committed [i]n June . . . the [sentencing memorandum] indicate[s] it was July." However, he has failed to develop any argument or provide any support for the proposition that this error warrants resentencing on this count. We therefore decline to address any such argument. *See Bolton*, 182 Ariz. at 298, 896 P.2d at 838.

CONCURRING:

/s/ Peter J. Eckerstrom
PETER J. ECKERSTROM, Presiding Judge

/s/ J. William Brammer, Jr.
J. WILLIAM BRAMMER, JR., Judge